IN THE

Supreme Court of the United States

October Term, 1967.

No. 57.

W. WILLARD WIRTZ, Secretary of Labor,
Petitioner,

v.

LOCAL 153, GLASS BOTTLE BLOWERS ASSOCIATION OF THE UNITED STATES AND CANADA, AFL-CIO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Brief and Appendix for Respondent

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Huntington Printing Corp., Appellate Printers, Camden, N. J.

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BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinions below are adequately set forth in the Secretary of Labor's Brief, pp. 1-2.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Secretary of Labor's Brief, p. 2.

QUESTIONS PRESENTED.

1. Whether the Secretary's action to set aside an allegedly invalid election is rendered moot if, pending appeal from and adverse judgment of the district court, the union conducts its regularly scheduled election.

2. Whether the district court correctly determined that the union's eligibility requirement rule for would-be candidates did not affect the outcome of the 1963 election.

STATUTE INVOLVED.

The pertinent provisions of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U. S. C. 401 *et seq.*, are set forth in the Appendix of the Secretary of Labor's Brief, pp. 55-62.

STATEMENT OF FACTS.

After a union member had complained to the Secretary of Labor that he had been disqualified as a candidate for local union office in Respondent Union's 1963 election because the complainant had not attended the required number of union meetings, as per the Local Union's Bylaws, the Secretary of Labor instituted an action, under Section 402 (b) of the Labor-Management Reporting & Disclosure Act of 1959, 73 Stat. 534, 29 U. S. C. 482 (b). The Secretary alleged that the election held by Respondent Union on October 18, 1963, violated Sections 401 (b) and (e) of the 1959 Act, and sought to have (1) the October 1963 election declared null and void, and (2) a court order for a new election conducted under his supervision.

The complainant in this action, John L. Miller, was elected Treasurer of Local 153 in 1959. Having attended 75% of the meetings held by the local union during the two years preceding the 1959 election, he had met the requirements of the meeting-attendance requirement rule, adopted by the delegates to the 1957 International Convention of the Glass Bottle Blowers Association, and was therefore eligible to become an officer. He was re-elected to the position of Treasurer in 1961—he again was eligible because he had met the requirement of the *75% Rule* during the two years preceding the 1961 election.

At no time prior to his disqualification as a candidate for the 1963 election did Mr. Miller voice any objection to the meeting-attendance requirement rule for would-be candidates or complain about its unreasonableness. However, when Mr. Miller was nominated for the office of President on August 8, 1963, and to the office of Treasurer on September 12, 1963, he was declared ineligible as a candidate since he had neglected to attend the required number of meetings.

Soon after the Local Union had conducted its regular 1963 election, in a letter to the President of the International

Union, Lee W. Minton, Mr. Miller protested his ineligibility for local union office and requested that he be permitted to run for office (R. 17). On October 28, 1963, International President Minton acknowledged receipt of Mr. Miller's letter and appointed International Representative Joseph Bonus to make an investigation of the Miller protest (R. 11).

Section 13 of Article IV of the Union's Bylaws provides:

> "... The record of attendance compiled by the Secretary is the final local authority to determine eligibility for local office, the election of delegates to National Conventions or such other meetings requiring elections."

After an examination of the attendance record book of Local 153 (in which the attendance or excused absences of every member at each meeting is recorded by the Recording Secretary), the International Representative, Mr. Bonus, found that Mr. Miller had been absent from the November 1961 meeting, the July, September and October meetings of 1962, and the February, June and July meetings of 1963.[1] Accordingly, the International recommended that Mr. Miller's protest be denied (R. 11).

In further pursuit of Mr. Miller's objection, International President Minton appointed two members of the Executive Board to investigate the situation (R. 11). These investigators upheld the findings of International Representative Bonus (R. 11). Notice of this was given to the complainant.

Dissatisfied with this result, Mr. Miller filed a complaint on January 31, 1964, with the Department of Labor, protesting the October 1963 election. The Secretary of Labor instituted the present action against the Union on March 31, 1964.

At both the pretrial conference and the hearing, Petitioner's counsel, in agreement with Respondent's counsel, and in response to the court's inquiry, made it clear that

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[1] Although he was also absent from the August 1962 meeting because his wife was ill, Mr. Miller was given attendance credit for that meeting (R. 36).

this was not the case of a corrupt and untrustworthy clique which had established itself in office pursuant to the 75% rule (R. 8), and that there was but one issue to be litigated before the court: the reasonableness of the 75% Rule as embodied in the International Constitution and Respondent Union's Bylaws.

Between the pretrial conference and the trial, the parties stipulated, *inter alia*, that although candidates for local union office are required by the Bylaws to attend 75% of the regular monthly meetings, because they are involved in a continuously-operating industry and work on rotating shifts, a substantial majority of the members could qualify as candidates for local union office even though they had not attended 75% of the local union meetings (R. 15)—the Bylaws also provide that a member can receive meeting-attendance credit if he was at work at the time a meeting was held.

The district court, after a trial without a jury, ruled that although the 75% attendance requirement imposed by the Bylaws was an unreasonable qualification within the meaning of Section 401 (e) because of the limited "excuse" area, since there had been no showing that this violation of Section 401 (e) "may have affected the outcome of" the 1963 election—a requirement which Section 402 (c) expressly makes prerequisite to a judicial granting of relief—the district court would not order a new election. At the same time, the court noted that :

(1) a new election was to be held within two months; and

(2) the evidence clearly indicated that the complaining union member, John Miller, although himself an officer and aware of the meeting-attendance requirement rule, had "voluntarily absented himself from meetings on occasions not justified by sickness or other unavoidable emergency, and thus his failure to qualify was not due to the existence of the unreasonable requirement of the By-laws, but to his own voluntary unwillingness to comply therewith." (R. 47).

The Secretary appealed from the Judgment of Dismissal.

Seven weeks after the district court's ruling, Respondent Union conducted its regularly scheduled election of officers. Since, in the period between August 26, 1965, the date of the district court's decision, and October 12, 1965, the date of the subsequent election, there was not sufficient time to effect a change in Respondent Union's Bylaws re the rule regarding "excuses", the election was conducted under the then existing Bylaws.

Pursuant to an Order of Remand directed by the Court of Appeals for the Third Circuit, the Secretary filed a "Motion for Post-Judgment Relief" in the district court. Although no office-seeker or union member had filed a complaint about the conduct of the 1965 election, the Secretary sought a declaration from the district court that Respondent Union's October 12, 1965, election was invalid, and a court order which would require the union to hold a new election under the Secretary's supervision.

Finding "that no candidates for union office were deterred or disqualified from being candidates by reason of application of said regulations" (R. 56), the district court refused to declare the October 1965 election invalid and refused to order a new election. The Secretary also appealed from the Order denying the post-judgment relief.

On review, the Court of Appeals for the Third Circuit held that the 1965 election of officers, as disclosed in the Secretary's post-judgment motion, made the original action challenging the 1963 election moot (R. 67), and that the challenge to the 1965 election must fail because no member of the union had filed with the Secretary a complaint seeking to invalidate that election (R. 67).

The Court of Appeals never reached the issue of whether the application of the 75% Rule, in this instance, may have affected the outcome of the election. However, the Judgment of the district court and the Order denying post-judgment relief were vacated, and the case was remanded to the district court "with instructions to dismiss the original

complaint as moot and also to dismiss the motion for post-judgment relief for lack of a prerequisite complaint by a union members." (R. 69).

SUMMARY OF ARGUMENT.

I.

Two Courts of Appeals, the Second Circuit and the Third Circuit, have correctly determined that the issue of the validity of a complained-about election was rendered moot when, subsequent to the dismissals of the Secretary's Title IV actions, and before either appellate court could review the determinations of dismissal, the unions conducted their regularly scheduled local elections. A third Court of Appeals, the Sixth Circuit, concluded that the Secretary's appeal as to the scope of the district court's order of relief was also rendered moot: while the appeal was pending, the union had conducted its regularly scheduled election for all offices with the exception of the office of Business Representative which was conducted under the supervision of the Secretary in compliance with the district court's order.

The Secretary's actions are moot because: court invalidation, in whole or in part, of an election which has already been superseded by a subsequent election would be an exercise in futility—there no longer is an invalid election to set aside; and because the intervening election, which has rendered moot the issue of the setting aside of the prior election, is not subject to attack by the Secretary where no complaining union member has invoked the mandatory statutory procedure for challenging the union election. *Calhoon v. Harvey,* 379 U. S. 134 (1964). The respective Courts of Appeals recognized that the statutory scheme adopted by Congress, in Section 402, was in furtherance of its desire to keep governmental interference in the internal affairs of a union to a minimum. Consequently, judicial

review of election irregularities is unavailable to the Secretary unless (1) a complaining union member has exhausted his union's internal remedies or has been denied a final decision within three months after invoking his internal remedies, and such member has filed a complaint with the Secretary of Labor within one month thereafter; and (2) the Secretary has, after investigation of the complaint, found probable cause to believe that an unremedied violation has occurred. In addition, the court is precluded from ordering the union to conduct an election under the supervision of the Secretary: the Secretary's right to conduct a supervised election is contingent upon a finding that the officers of the union were invalidly elected, but unless a member of the union has exhausted his remedies and complained to the Secretary, the court cannot make a finding as to the validity of the election. Since the present union officers hold office pursuant to an unchallenged subsequent election, their right to a full constitutional term is not subject to judicial abortion just because a Title IV violation may have occurred in the previous election.

II.

The district court was of the opinion that when the local union's meeting attendance requirement rule was coupled with the local union's rule regarding excuses the number of candidates eligible to compete for local union office was severely limited and there was, therefore, a violation of the Act. However, before the district court could declare the 1963 election void and direct the conduct of a new election under the supervision of the Secretary, the district court had to make a finding that the alleged violation "may have affected the outcome" of the 1963 election. Since the evidence established that there was no causal relationship between the "existence of the unreasonable requirements of the By-laws" and the disqualification of the

complaining union member—a man who had "voluntarily absented himself from meetings on occasions not justified by sickness or other unavoidable emergency," the district court found that the Secretary had failed to establish that the alleged violation of Section 401 (e) had affected the outcome of the 1963 election. Under these circumstances, the district court correctly determined that it had no jurisdiction to set aside the 1963 election of the local union.

The trial court's opportunity to observe the witnesses and to evaluate the evidence presented is entitled to great weight. Unless the reviewing court is thoroughly satisfied that the finding of the trial court is not supported by the evidence in the record, a trial *de novo* by the reviewing court should not be resorted to.

ARGUMENT.

I.

AN ACTION BY THE SECRETARY TO SET ASIDE A CHALLENGED UNION ELECTION IS RENDERED MOOT BY AN UNCHALLENGED INTERVENING ELECTION.

A. Statutory language and legislative history.

An analysis of Title IV's statutory scheme reveals that the respective Courts of Appeals which have considered the issue of "mootness"[2] were clearly correct when they ordered dismissal of the Secretary's actions: the holding of a subsequent election by the union had negated the need for

[2] The Second, Third and Sixth Circuit Courts of Appeals have considered the effect of a subsequent election on the Secretary's action to have a complained-about prior election declared invalid, and have held that the holding of the subsequent election mooted the Secretary's suit to have the challenged election set aside.

relief from an allegedly invalid election—thereby rendering the Secretary's action "moot", and the Secretary's attack on the subsequent election could not be sustained as permissible under any interpretation of the statutory provisions found in Title IV.

To begin with, the pertinent language of Section 402 (a) provides:

> "A member of a labor organization ——
>
> (1) who has exhausted the remedies available under the constitution and bylaws of such organization . . ., or
>
> (2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation, may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of Section 401 . . . The challenged election shall be presumed valid pending a final decision thereon . . . and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide."

It was this clearly expressed statutory scheme which motivated the Second Circuit in the cases of *Wirtz v. Local Union 30, Int'l Union of Operating Engineers*, 366 F. 2d 438 (2d Cir. 1966) and *Wirtz v. Local 410, etc., IUOE*, 366 F. 2d 438, 442 (2d Cir. 1966) to hold that:

> ". . . the Secretary has no standing to attack the 1965 elections since no member of Local 30 or of Local 410 has filed a valid complaint challenging them."

The Third Circuit, in the instant case, after it had examined the statutory scheme set out above, was also forced to conclude that the Secretary's:

> ". . . challenge to the 1965 election must fail because no member of the union has filed with the Secretary a complaint seeking to invalidate that election."[3]

Both circuit courts recognized that since the enforcement provision contained in Section 402 (a) merely provides an

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[3] **Wirtz v. Local 153, GBBA**, 372 F. 2d 86, 87 (2d Cir. 1966).

administrative and judicial procedure for determining the validity of "a particular election", the Secretary could only seek to set aside *that* election which had been the subject of a complaint by a union member who had exhausted his union's internal remedies. Consequently, where no union member had challenged the validity of the subsequent election, the Secretary could not attack the validity of that election.

As for the challenged elections, both circuit courts were in agreement that:

> ". . . It would serve no practical purpose with respect to these locals to declare [the superseded] elections void because the terms of office thereby conferred have expired . . ."[4]

The Secretary, in the *Local 153* case, was also forced to concede that "the holding of the 1965 election ha[d], of course, removed from the case any immediate need for declaring the 1963 election void, since the terms of office for which the election was held ha[d] expired."[5] However, he contends that his action is not rendered moot because he is, nevertheless, entitled to supervise the union's next election. This contention is predicated upon the hypothesis that "the taint of the original election infects the next [election] and is only curable by the Secretary's 'laboratory' election."[6] The flaws in the Secretary's proposition are patent.

Firstly, the abuses which existed in the original election may have been corrected by positive union action or may have been corrected by simple attrition. In Petitioner's brief, page 33, the Secretary argued that "the futile remedy of a second suit [is not] mandated by the complaint-and-exhaustion requirement of the Act. Where, as in No. 57,

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[4] **Wirtz v. Local Unions 410, etc., Int'l Union of Operating Engineers,** 366 F. 2d 438, 442 (1966). This language of the Second Circuit was adopted verbatim by the Third Circuit in **Wirtz v. Local 153 GBBA,** 372 F. 2d 86, 88 (1966).

[5] Appellant's Brief to the Third Circuit, p. 17.

[6] Brief for Petitioner, p. 19.

the union has already refused to change its candidacy qualifications . . ." This argument is deliberately designed to mislead the Court and overstates the Secretary's case. Following the dismissal of the Secretary's attack on the local union's 1963 election, and in response to the Secretary's motion for post-judgment relief from the local union's 1965 election, the district court pointed out on May 27, 1966, that it had been assured "that defendants in good faith and with due diligence [were] taking steps with all convenient speed to reform and amend the regulations governing elections so as to bring them into conformity with the views expressed in this Court's opinion . . ."(R. 56). The district court had been apprised of the fact that conferences regarding the settlement of the "75% meeting attendance requirement" issue and the International Union's area of excuses had been in progress between Secretary of Labor, W. Willard Wirtz, and Lee W. Minton, President of the International Union, or their respective representatives, since November, 1965. An expanded list of excuses was then proposed, in a letter on June 22, 1966, by President Minton to Secretary Wirtz (R. 58-60). Secretary Wirtz, while recognizing that the proposed changes would mitigate the disqualifying effect of the 75% *rule*, took the position that only a complete waiver of the meeting attendance requirement rule would prove satisfactory (R. 60-61). In effect, he took the arbitrary position that the 75% meeting attendance requirement rule was *per se* invalid, even though the rule also served a valid purpose. Despite the Secretary's assumption of this arbitrary position, the International Union, at its September, 1966, Executive Board meeting, in order to insure the greatest latitude for candidacy in local union elections, expanded the area of acceptable excuses so that more members could meet the candidacy requirement rule; and also adopted the suggestion of the trial judge that, in any event, at least "10 percent of the membership" shall be eligible to be nominated as candidates for local union office—so that the members have "a chance to choose between two full slates." In light of the adoption of a

substantially enlarged and liberal excuse area, it would appear that in substance the only time that a member of any of the local unions would not find himself credited with attending a sufficient number of meetings in order to meet the requirement of the 75% attendance rule would be where he deliberately absented himself from the meetings or had no interest whatsoever in union meeting attendance. The Secretary, through his representatives, has been made aware of this activity on the part of the International Union,[7] and it is respectfully submitted that the argument referred to above should not have been made.

Secondly, there are no guarantees that the Secretary's "laboratory" election will provide the panacea for the union's so-called election ills.

Thirdly, there should be some positive nexus between the complained-about election and the subsequent election where an allegation of "taint" is submitted. Clearly, in the *Local 153* case, there was no nexus, whatsoever, between the attacked 1963 election and the uncomplained-about 1965 election. Each election was a separate and distinct entity, and the validity of the 1965 election was not subject to attack merely because the 1963 election had been validly challenged. A complaint, filed by a union member who had exhausted his union's internal remedies, was required before the Secretary could launch his attack against the 1965 election. This requirement was not satisfied by the existence of a complaint which solely contested the validity of the 1963 election.

Even where there is arguably some nexus between a subsequent "run-off" election and the original election, a court may not entertain jurisdiction over the original election unless a complainant has challenged the validity of the original election. A complaint directed to the run-off elec-

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[7] The Secretary is, and has been, involved in litigation with several other Local Unions of the Glass Bottle Blowers Association—Local 257, Local 262 and Local 66. In each one of these cases the validity of the Respondent's 75% rule in relationship to the Local Union's area of excuses has been a bone of contention.

tion does not encompass the original election and consequently, cannot be used by the Secretary to bootstrap himself into a position where he may attack the original election. *Wirtz v. Local 125, Int'l Hod Carriers', etc.*, 231 F. Supp. 590 (N. D. Ohio 1964). The nexus must be of a greater magnitude. Where there is not even the scintilla of a relationship between the two elections, the proscription on the court's jurisdiction is patent. And the Secretary's attempt to have the 1965 election conducted by Local 153 declared invalid and a supervised election ordered, when no union member has complained about any of its substantive or procedural aspects, is clearly *ultra vires*. It is settled law that the Secretary may not challenge a union election unless a union member has first complained about it. *Calhoon v. Harvey*, 379 U. S. 134, 140 (1964).

In addition, the Secretary must reconcile his attempt to have the unchallenged election declared invalid with the statutory presumption of validity which attaches to all elections—even challenged ones, and the statutory provision set forth in Section 402 (b) that the "Secretary shall . . . bring a civil action . . . to set aside the *invalid* election . . ." The fact that Congress expressly provided that even challenged elections were to "be presumed valid pending a final decision thereon" compels the conclusion that Congress meant to circumscribe an unchallenged election with an irrebuttable cloak of validity. And the fact that Congress linked the judicial ordering of a supervised election with the setting aside of an *invalid* election which had been properly challenged adds additional support to Respondent Union's contention that the gamut of the Secretary's authority was severely limited. Note that Section 402 (b) expressly provides that:

> "The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred . . . he shall . . . bring a civil action . . . to set aside *the invalid election*, if any, and to direct the conduct of an election . . . under the supervision of the Secretary . . ." (Emphasis added.)

Clearly, it is only *the challenged election,* which is later found to be an "invalid election," and not just *any* election of the union which may be set aside—albeit the issue of the validity of the challenged election has become moot.

It is hardly subject to dispute that the precise words of the statute were the subject of much congressional debate and compromise. Congress' use of the word "challenged" to modify the word "election" in Section 402 (a) (2)—when it was concerned with the initiation of cases, and its subsequent use of the word "invalid" to modify the word "election" in Section 402 (b)—when it was concerned with setting aside elections, was not merely fortuitous. On the contrary, since it is patently expressive of Congress' intention that only invalid elections would be set aside, it must be given great weight.

Section 402 (c) lends further support to Respondent Union's position that where mootness intervenes and makes a court declaration as to the validity of a challenged election unnecessary, the court must dismiss the action unless a valid complaint attacking the supervening election has been filed. The pertinent language of Section 402 (c) requires the court, where there is a violation, to "declare *the election,* if any, to be void. . . ." Under the recognized canons of grammatical construction, "the election" referred to in this subsection must unquestionably be the same "election" referred to in the immediately preceding subsection, i.e., the "invalid election" referred to in Section 402 (b)—since it is only where the union has failed to conduct an election within the prescribed statutory time (Section 401), or where there is a finding that there was a violation of Section 401 which "may have affected the outcome of an election" that a court may order a supervised election. Nevertheless, the Secretary would like to change, by judicial fiat, the express language of Section 402 (c) so that it reads "any" election of the union may be set aside if there is a finding that a Title IV provision has been violated in any of the union's previous elections. The clearly expressed

statutory language precludes such an extension of the Secretary's powers. And,

> "Where the statute is clear and unambiguous, as we believe the provision now under consideration to be, there is no occasion for resort to the legislative record." *Wirtz v. Local 191, Int'l Brotherhood of Teamsters, etc.*, 321 F. 2d 445, 448 (2d Cir. 1963).

Nevertheless, an examination of the legislative history of the LMRDA leads one to the same conclusion reached by the three Courts of Appeals upon analysis of the statutory scheme, i.e., that since the Secretary's action is rendered moot where, during the time each case is on appeal, the union conducts its next regularly scheduled election, the court must dismiss the Secretary's action unless a union member has properly attacked the subsequent election.

The legislative history of the Act discloses that it was one of the most controversial efforts before the Congress in a decade. Two years of extensive public hearings pointed up the need for legislation that would not only guarantee the individual members a voice in the democratic control of the union's organization and protect the rights of individual union members, but which would also sustain the internal stability of union organizations.[8]

The adoption of Section 402, with its elaborate protections against unjustifiable interference with internal union processes, at a time when there was such great agitation for legislative control in the labor-management area, was the result of congressional recognition that there was also a concomitant need for restraint in regulating the internal affairs of unions. *Calhoon v. Harvey*, 379 U. S. 134, 140 (1964). Consequently, in compliance with this avowed purpose, Congress severely limited the Secretary's power

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[8] **Wirtz v. Local 9, etc., Int'l Union of Operating Engineers**, 366 F. 2d 911, 913 (10th Cir. 1966).

in Title IV cases, by providing an elaborate exhaustion scheme. *Wirtz v. Local Unions No. 9, etc., Int'l Union of Operating Engineers,* 366 F. 2d 911 (10th Cir. 1966).[9]

Note that even Professor Archibald Cox, the commentator who had made one of the most articulate pleas for legislative control in this area, and who had urged most strongly the passage of the Labor-Management Reporting and Disclosure Act, so as to preserve democracy within unions and to guarantee to every union member the right to make his voice heard in the formulation of union policy, viewed the exhaustion of internal remedies as a necessary part of the proposed legislation. In fact, he specifically rejected one form of proposed legislation, then pending, which would have given the government wide powers to regulate the internal affairs of unions.[10]

In his article, *The Role of Law in Preserving Union Democracy,* 72 Harv. L. Rev. 609, 630 (1959), Cox said:

> "The fundamental objection is that it would have turned over to an arm of the federal government the responsibility of carrying on the internal governmental processes of a labor union without any showing that the union officers and members were incompetent and corrupt. Such a measure does not promote freedom or democracy. It reduces self-government. It denies the private responsibility and self-determination which lie at the heart of a voluntary association."

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[9] If Congress had wished to entrust the Secretary with an open-end power, it could have so provided, as it did in the NLRA, for example, where it provided that the power to issue a complaint is not limited by an exhaustion procedure but rather by a time limitation: "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of a charge . . ." National Labor Relations Act, Section 10 (b), 61 Stat. 146, 29 USC Section 160 (b); **Local Lodge No. 1424 v. NLRB,** 362 U. S. 411 (1960).

[10] **Wirtz v. Local 125, Int'l Hod Carriers', etc.,** 231 F. Supp. 590 (N. D. Ohio, 1964).

Commenting further upon the problem of union elections, Professor Cox pointed out that:

> "Requiring the exhaustion of internal remedies would preserve a maximum amount of independence and self-government by giving every international union the opportunity to correct improper local elections . . ." Id. at p. 633.

Despite this statutory analysis and legislative background, the Secretary seems to say that once he has the right to investigate and correct by suit one union election, this grants him *carte blanche* authority to reach the union's subsequent elections, even if his attack on the complained about election has been mooted by the holding of a subsequent election. However, the powers granted the Secretary under Title IV are not equal in magnitude to the powers granted to the Secretary in Title VI of the Act. In distinguishing the investigatory powers of the Secretary under Section 601 from the powers of the Secretary under Section 402, the First Circuit pointed out in *Local 57, IUOE v. Wirtz*, 346 F. 2d 552, 554 (1st Cir. 1965), that whereas the Secretary's authority to institute a court action to set aside a presumptively valid election "is conditioned upon the filing of a complaint by a union member who has exhausted his internal union remedies," his power to investigate an election is not conditioned upon the receipt of a complaint from an individual member of the union, *Wirtz v. Local 191, Int'l Brotherhood of Teamsters, etc.*, 321 F. 2d 445, 447 (2d Cir. 1963). Neither is his power to investigate contingent upon the establishment of probable cause or a reasonable basis for the investigation, *Goldberg v. Truck Drivers Local Union No. 299*, 293 F. 2d 807, 812 (6th Cir. 1961), *cert. den.* 368 U. S. 938 (1961). Through the media of such investigations, once information has been obtained and reports compiled, the Secretary, where he deems further activity necessary, may disseminate the fruits of his investigative activities to the rank and file members of the union. Of course, the more desirable

procedure is to first offer the accumulated information to the union officers so that they may have the first opportunity to cure any cankerous sores which may have infected the union—in consonance with the underlying legislative philosophy of fairness. If the officers fail to act, the information could then be made available to the union membership and the general public. Since disclosure, in and of itself, is a powerful weapon, it was anticipated that these disclosures would have a strong prophylactic effect on union abuses. Note that, in Section 601 (a) of the Act, Congress provided that:

> ". . . the Secretary may report *to interested persons* or officials concerning the fact required to be shown in any report required by this Act and concerning the reasons for failure or refusal to file such a report or any other matter which he deems appropriate as a result of such an investigation." (Emphasis added.)

In formulating this broad grant of power to the Secretary, the Senate Committee on Labor and Public Welfare recognized that:

> ". . . This provision insures that union members will have all the vital information necessary for them to take effective action in regulating the affairs of their trade union, either through voluntary compliance of the labor organization . . . or as a result of investigation and reports by the Secretary of Labor." Senate Report 187 on S 1555, I *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, p. 405 (1959).

Clearly, the underlying philosophy of Section 601 is consonant with the philosophy expressed by the framers of Section 402 (a) and 402 (b) in Senate Report 187 on S 1555, I *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, p. 403 (1959), i.e., that:

> "Given the maintenance of minimum democratic safeguards and *detailed essential information* about the union, the individual members are fully competent to regulate union affairs." (Emphasis added.)

B. There is a condition precedent to the Secretary's power to supervise an election: there must be an invalid election still in existence which the Court can set aside.

In the *Local 153* case, the Secretary's action became moot because subsequent to the district court's decision, in accordance with the International's Constitution, the Local's By-Laws,[11] and the LMRDA's requirement that elections be held triennially (Section 401 [b]), Respondent Union conducted its October, 1965 election. Consequently, the present officers of the union are not holding office pursuant to the challenged 1963 election, but are holding office pursuant to the unchallenged and therefore valid 1965 election.

In *St. Pierre v. U. S.*, 319 U. S. 41, 42 (1943), the Court held that:

> "The Federal Court is without power to decide moot questions or to give advisory opinions that cannot affect the rights of the litigants in the case before it."

See also *California v. San Pablo & Tulare Railroad Co.*, 149 U. S. 308 (1893), and *U. S. v. Alaska Steamship Co.*, 253 U. S. 113, 116 (1920), where this Court pointed out:

> " . . . Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly. . . ."

Since the rights of litigants are, *a fortiori*, "affected by the judicial remedies available, in evaluating whether a par-

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[11] The International Constitution of the GBBA and the By-laws of Local 153 provide that elections for officers are to be held every two years. Since the election held on October 12, 1965, was in compliance with the Local's By-laws and the International's Constitution, there was no attempt on the part of the Union to render the issue of the 1963 election moot by holding a supervening election. It is also significant that at the time the 1965 election was conducted, no proceedings were pending: the district court had already ruled on the 1963 election, but had not ordered a supervised election, and no appeal from that court's decision had, as yet, been instituted.

ticular appeal has become moot, attention must be focused on the particular relief sought by the appellant." *Wirtz v. Local 410, et al.*, and *Wirtz v. Local 30, etc., supra*, at p. 442.

The installation of the officers elected in the 1965 election removed from office those officers elected in the 1963 election. Consequently, there was no need for the Third Circuit to declare the 1963 election void. Similar situations occurred in the *Local 125* case before the Sixth Circuit, and in the *Local 410* and *Local 30* cases which were before the Second Circuit Court of Appeals. When each of the three respective Courts of Appeals focused its attention on the relief desired by the Secretary, each recognized that it would be performing a vain act if it were to invalidate an election which had already been superseded by a subsequent validly held election.

Although the Secretary has on occasion recognized that the holding of a subsequent election may moot his action,[12] he argues that he is, nevertheless, entitled to conduct a supervised election. However, if the Secretary is allowed to conduct a supervised election, once a validly conducted election has been held, an anomalous situation will arise: validly elected union officers may be denied their right to hold office. Such a course of events would be in direct contravention of the express provisions of the statute—the Secretary's right to conduct a supervised election is dependent upon a judicial determination that there are *invalidly elected* officers in control of the union at the time a supervised election is ordered by the court. (Section 402 [b]). The holding of a regularly scheduled subsequent election destroys the predicate upon which the Secretary alleges his cathartic right is based, since allegedly invalidly-elected officers are no longer in office. The officers now in charge of the management of the union's affairs hold office

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[12] Appellant's Brief to Third Circuit, p. 17. See discussion on p. 11, **supra.**

pursuant to a validly conducted election, and Congress has provided in Section 403 that:

> "No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by this title. . . ."

The Secretary insists, however, that a "continuing need for a laboratory election exists when it is not known whether the violation [which gave] rise to the Secretary's suit persisted in the second election."[13] Respondent Union will not belabor the exhaustion requirement which it considers is controlling in this situation, but instead it directs its attention to the Secretary's inference that the presence of a continuing controversy would entitle the Secretary to a supervised election even though the complained-about election may have been superseded by a validly conducted election. Although the federal courts have developed a doctrine which permits a court to consider a case which is moot on its exact facts, but which represents a continuing controversy between the parties, election cases have not been encompassed by this "continuing controversy" doctrine. *Cases Moot On Appeal: A Limit On the Judicial Power,* 103 U. of Pa. L. Rev. 772, 786 (1955).[14] When faced with the election cases, the courts, in most instances, have advanced these cases to the top of the argument list in order to avoid mootness.[15] Nor may the Secretary gain any support for his contention that the courts are empowered "to undo elections not themselves shown to be illegal" by his

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[13] Brief for Petitioner, p. 21.

[14] **Shub v. Simpson,** 340 U. S. 861 (1950); **MacDougall v. Green,** 335 U. S. 281, 284 (1948) (concurring opinion); **DeHoff v. Imerson,** 153 Fla. 553, 15 So. 2d 258 (1943); **Brown v. Lieb,** 267 Pa. 24, 110 Atl. 463 (1920).

[15] **Ray v. Blair,** decision reported, 343 U. S. 154, opinion reported, 343 U. S. 214 (1952).

reference to the Voting Rights Act of 1965, 79 Stat. 437, 42 U. S. C. 1973, *et seq.* (Petitioner's Brief, p. 27). On the contrary, the specific grant of power to the district courts to retain jurisdiction of election suits in voting rights cases "for such period as it may deem appropriate," along with the concomitant legislative grant of power to the district courts to issue injunctions, must be placed in juxtaposition with the lack of any such grant of power to the courts in LMRDA election cases. When so viewed, the conclusion is inescapable that Congress intended a narrow scope of authority for the courts in Title IV cases. Had it desired otherwise, it would have so provided.

The Secretary also invokes the doctrine of "public interest." Again he has placed "too great a weight on too frail a reed." The legislative history, discussed at Point I, *supra*, discloses that Congress sought, in the public interest, to insure: (1) that union organizations would reflect the will of the majority of their constituents, and (2) that there would be a minimum of governmental meddling in union affairs. In order to promote these objectives and in order to circumvent any unwarranted infringement on the autonomy of the union and the sovereignty of its members, the legislators provided rigid machinery through which complaining union members could vindicate their positions. Consequently, the rhetoric of "public interest" cannot be employed to mean that public rights outweigh the union's right to self-government. Nor can it be invoked to create the impression that they are diametrically opposed to one another. For when attention is focused on the union's right to maintain its autonomy and the public's right to impose minimum standards of conduct on the union, it is clear that they are in apposition to one another. Cf. *Int'l Union, Local 283 v. Scofield*, 382 U. S. 205, 217-221 (1965).

As the district court, in response to the Secretary's invocation of the doctrine of public interest, pointed out in *Wirtz v. Local Union No. 125, Int'l Hod Carriers' etc., supra*, at p. 595:

> ". . . It is highly significant that not one voice of protest has been heard from the membership against the conduct of that election. We do not think that the Secretary under the guise of 'public interest' may be permitted to complain when the membership has not; to hold otherwise would, in fact, be inimical to true public interest because it would require legislation by judicial fiat. If the members are satisfied, then the government ought to be satisfied."

Unless the Secretary can establish that he is the 501st member of the Local, he does not have standing to complain about possible unlawful election procedures which may have occurred in the Union's 1965 election. See also, *Mamula v. United Steelworkers of America*, 304 F. 2d 108, 113 (3rd Cir. 1962), where the court said:

> ". . . an individual does not have standing to litigate the rights of another. E.g., *McGowan v. Maryland*, 336 U. S. 420 (1961); *Cronin v. Adams*, 192 U. S. 108 (1904)."

And in the absence of a complaint by a union member, the Secretary has no statutory right to invoke the judicial process in order to attack a union election which has rendered moot the issue of the validity of the prior election.

Respondent Union deems it necessary to take issue with the Secretary's inferences, scattered throughout his brief, that it is only the Secretary who is interested in seeing that union elections are fairly and democratically conducted; and that it is only through a "laboratory" election that the *advantages* enjoyed by incumbents seeking reelection—in conjunction with the undemocratic procedures employed by these incumbents, may be abated. This inference flies in the face of Petitioner's candid concession at the Pre-Trial Conference held on March 19, 1965, that "there is no claim that there is any particular evil resulting from this election" (R. 9), nor "a corrupt and untrustworthy clique" which has succeeded in establishing itself in office (R. 8).

In view of the Secretary's inferences, it is highly significant that in the instant case the Secretary is championing the cause of an *incumbent* who was denied the opportunity to be a candidate for an office he had held for two terms (R. 27), whereas the union member who was eventually elected to the position formerly held by the complaining union member had never held a union office before he was elected Treasurer in the October 1963 election. Under these circumstances, it is indeed difficult to reconcile Petitioner's inferences that this union is seeking to perpetuate its incumbent officers in office with the candidacy disqualification of an incumbent officer.

Congress has set forth, in express statutory language, the procedure that must be followed before the validity of a union election may be challenged in the courts. Since a suit to declare an election void (with its concomitant demand for a supervised election) is predicated upon the propositions that (1) a union member has made a proper complaint to the Secretary (as to the election under attack after the exhaustion of his internal union remedies), and (2) that the Secretary has made a finding following a careful investigation of the complaint that a violation of Section 401 has probably occurred, it is respectfully submitted that it does not lie within the discretionary power of any court to erase the explicit conditions which Congress has written into the statute.

As the Second Circuit Court of Appeals recognized in the *Local 30* and *Local 410* cases, *supra:*

> "... And because Title IV does not permit the Secretary to seek either to enjoin future elections, or to declare a given candidacy requirement unlawful absent a valid complaint and an investigation of its application to a specific election, cf. *Calhoon v. Harvey, supra,* we conclude that we have no power to afford the Secretary

relief and therefore that these cases are moot." 336 F. 2d at p. 442.[16]

And as the Third Circuit Court of Appeals recognized in the *Local 153* case:

> "For whatever reasons, Congress, in enacting the enforcement provisions contained in section 402, did no more than to provide an administrative and judicial procedure for determining the legality of a particular election of local union officers. The only suit authorized under section 402 is a suit by the Secretary to set aside that election of which an aggrieved unionist has complained."

Congress intentionally created a narrow remedy under Title IV of the LMRDA so that interference with union elections and management would be kept at a minimum. *Calhoon v. Harvey, supra,* at p. 140.

The Secretary has contended that if these actions are dismissed as moot, frequently scheduled union elections and the procedural requirements of Title IV raise significant barriers to appellate review. However, analysis of the statutory scheme reveals that while a complaining union member must attempt to invoke internal union remedies, he need only wait three (3) months after such invocation before filing his complaint with the Secretary. It is also evident that, while the Secretary must investigate each complaint and make a finding that a violation has probably occurred, the statute requires him to bring his suit, wherein he challenges the election, within sixty (60) days of the filing of the complaint by the union member. As the Second Circuit pointed out in the *Local 410* and *Local 30* cases,

> ". . . it is the delays incident to civil cases in the district courts which create the substantial likelihood that subsequent union elections will moot Title IV cases prior to appellate review.",

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[16] This language was adopted by the Third Circuit in the **Local 153** case, 372 F. 2d at p. 88.

rather than the design of union officials. Contrary to the Secretary's contention, the "expedition" suggestion of the Second Circuit, which was adopted by the Third Circuit and the Sixth Circuit in the respective cases before them, is not "unworkable." Without the benefit of any mandate from the appellate courts that the district courts are to expedite Title IV cases, the Secretary was empowered by the respective district courts to supervise at least 69% of the 75 elections he had challenged in court actions between the period of September 14, 1959 and June 30, 1965.[17] Only 8 (including the *Local 153* and *Local 125* actions) or less than 9.3% of the 75 actions were dismissed in whole or in part on the ground of mootness.[18] Nevertheless, the Secretary makes much ado of the impeding effect of the application of a mootness doctrine to Title IV cases, and apparently would like to create the impression that if he is not granted judicial relief in these isolated instances, his powers under Title IV will be illusory. In light of the Secretary's concern with percentages (see Point II, pp. 32-33, *infra*, where the Secretary's attack on the union's candidacy requirement rule, because only a small percentage of the union members could qualify as candidates for union office, is discussed), how can he validily argue that if the mootness doctrine is not abandoned in Title IV cases, "effective relief against unlawful elections will in many cases be impossible."? (Petitioner's Brief, p. 38).

As for injunctive relief, *pendente lite*, we are in accord with the Secretary that such relief is not available—even where there is a *prima facie* showing that the Act has been violated. In addition to the reasons set forth by the Secretary in his brief, Congress, after it provided that "an order directing an election shall not be stayed pending appeal," undoubtedly recognized the necessity for balancing the rights of the Secretary against the rights of the union. The

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[17] Note, **Election Remedies Under the Labor-Management Reporting and Disclosure Act**, 78 Harv. L. Rev. 1617, 1633 (1965).

[18] See Respondent's Brief in Case No. 58, Appendix B.

quid pro quo for the express legislative denial of a stay of a supervised election when ordered by the court, Section 402 (d), was that the Secretary was implicitly denied *pendente lite* relief.

If a proper interpretation of the express statutory language demands a result which does, in fact, frustrate the objectives of the provisions enacted by Congress in 1959, then the Secretary must appeal to the legislature for such legislative enactments as will, in his judgment, remedy the problems he encounters. Resort to this Court whenever the Secretary is dissatisfied with the results that explicit legislation compels is not the proper avenue for amending the laws of Congress.

II.

PETITIONER HAS FAILED TO ESTABLISH THAT THE MEETING ATTENDANCE REQUIREMENT RULE FOR WOULD-BE CANDIDATES "MAY HAVE AFFECTED THE OUTCOME" OF THE 1963 ELECTION.

The main purpose and thrust of Title IV of the LMRDA was to prevent a small group of so-called "union leaders" from permanently vesting control of the organization in their hands by either refusing to hold elections, or by holding them under such conditions that no dissenting voice could be heard. At the same time, however, Congress recognized that if responsibility was to be promoted in the rank and file of the union membership, governmental interference with the internal processes of the union must be kept at a minimum. Consequently, although the Secretary was empowered to lend his assistance to union members who desired to achieve a democratically and fairly-administered organization, it must be noted that Congress

". . . did not purport to take away from labor unions

the governance of their own internal affairs and hand that governance over either to the courts or to the Secretary of Labor. The Act strictly limits official interference in the internal affairs of unions. See, *Calhoon v. Harvey*, 379 U. S. 134, 57 LRRM 2561 (1964); *Gurton v. Arons*, 339 F. 2d 371, 58 LRRM 2080 (2d Cir. 1964). The Act prescribes only certain basic minima and leaves the area not covered by these minimum prescriptions to the decisions of the unions themselves." *Wirtz v. Hotel, Motel and Club Employees*, —— F. 2d ——, 65 LRRM, 3032, 3034 (July 28, 1967).

Clearly, a balancing policy was invoked here,[19] and the adoption of the enforcement provisions, set forth in Section 402 and discussed in detail throughout Point I, *supra*, reflect congressional recognition that union autonomy and membership sovereignty must be protected from well-intentioned, but frequently fatal, paternalistic legislative or administrative regulations.

Section 401 (e) of the Act, which is concerned with elections and nominating procedures, is an unequivocal manifestation of congressional reluctance to "dictate to the unions what their constitution and bylaws procedure shall be in conducting their elections,[20] and indicates that the proponents of the Act had no desire to impose "upon the unions [their] notions of what an election straightjacket should be."[21]

> "The committee gave careful study to various proposals providing for the *conduct of union elections by*

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[19] In **National Woodwork Manufacturers Assn. v. NLRB**, 386 U. S. 612, 619 (1967), this Court admonished that: labor legislation is peculiarly the product of legislative compromise of strongly held views.

[20] Cong. Rec., Senate—April 25, 1959, **II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959**, p. 1244 (1959).

[21] **Id.** at p. 1245.

the National Labor Relations Board upon the request of a small percentage of the members. The committee rejected this approach for two reasons.

"One fundamental objection is that these proposals turn over to an arm of the State the responsibility for carrying on the internal governmental processes of voluntary associations without any showing that the union officers and members are incompetent or corrupt. *Such a measure does not promote freedom or democracy.* It reduces self-government. It denies the private responsibility and self-determination which lie at the heart of a voluntary association."[22] (Emphasis added.)

The broad area of discretion afforded unions by Section 401 (e) is consonant with the numerous assurances made by the proponents of the Act: that it was not their intention "to write [or rewrite] the union constitution and bylaws provisions for the union,"[23] or "to turn the Congress of the United States into a constitutional convention and bylaws legislative body for all the unions of America."[24]

In furtherance of its avowedly laudable desire to keep governmental interference in the internal affairs of a union to a minimum, and in recognition (1) that not all members of the union may be capable or qualified to assume a role of leadership in the internal affairs of the union; (2) that any qualifications which are to be adopted must emanate from the union members themselves through democratic processes; and (3) that such criteria as: ability, knowledge of the trade, a sense of long-term identification with the

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[22] United States Department of Labor, **Legislative History of the Labor-Management Reporting and Disclosure Act of 1959**, p. 702 (1964).

[23] Cong. Rec., Senate—April 25, 1959, **II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959**, p. 1245 (1959).

[24] **Id.** at p. 1244.

local, and interest in union affairs may be germane to office-holding, Congress explicitly empowered unions to adopt basic rules which were designed to protect their legal vital interests and desired objectives. Note that Section 401 (e), in addition to providing that "every member in good standing . . . shall have the right to vote for or otherwise support the candidate or candidates of his choice" without reprisal, expressly reserves to unions the right to impose "reasonable qualifications" upon the right of a member to be a candidate for union office.

One court has determined that the word "reasonable" means "fit and appropriate to the end in view." *State v. Vandersluis,* 43 N. W. 789 (Minn. 1889). And the district court in the *Local 153* case took the position that the "question of reasonableness is a difficult one and must ultimately be decided by the courts in the light of the facts in particular cases.". *Wirtz v. Local 153, GBBA,* 244 F. Supp. 745, 748 (W. D. Pa. 1965). It is respectfully submitted that Local 153's 75% attendance requirement rule is *reasonable* under either of the aforementioned tests.[25] Even the Secretary has admitted that:

> "The question of whether a qualification is reasonable is a matter which is not susceptible to precise definition and in the last analysis will be determined by the courts."[26]

Totally irrelevant to the issue of "reasonableness" is the number or percentage of the union members who are qualified to be officer candidates because of the meeting attendance requirement rule. In addition:

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[25] The vacation of the district court's "judgment on the merits" by the Third Circuit (R. 69) leaves the legal issue of the "reasonableness" of Respondent Union's candidacy qualification rule unresolved.

[26] Office of Labor-Management Reports: Interpretations Election Provisions, Section 452.7, Candidacy for Office, **Labor Relations Expeditor,** p. 7134 (1964).

> "To select a particular percentage of attendance as being reasonable and hence permissible is akin to the task of determining what percentage of market control is necessary to establish the existence of a monopoly." *Wirtz v. Local 153, GBBA*, 244 F. Supp. 745, 748.

Furthermore, there is no statutory requirement that a minimum number or percentage of the union membership must meet any "qualification" imposed on would-be candidates.

Equally irrelevant is the history of success or failure of opposition candidates, although it is interesting to note that a non-incumbent member was declared eligible to be a candidate in the 1963 election, at the same time that an incumbent officer was declared ineligible. Whether or not there may be better ways of achieving the legitimate purpose is also irrelevant.

Clearly, whether or not the candidacy qualification is reasonable is a question of law, and the test to be applied in each case is not whether the Secretary, or even the Court, believes that the qualifications imposed by the Union are the best, or the wisest, or the most practical, or even the *most* reasonable, but only whether the criteria adopted by the union and imposed on would-be candidates can be construed as "reasonable", i.e., whether it is a legitimate device aimed at achieving a salutary objective under the Act.

Turning to the application of this criteria to the present case, it should be specifically noted at this time that the *Local 153* case does not involve an attempt by the Secretary to overthrow a corrupt and untrustworthy clique which has established itself in office pursuant to a meeting attendance requirement rule (R. 8). Nor is there a claim that the 75% meeting attendance requirement rule has resulted in maladministration of the local union by a particular group of incumbents (R. 8). The Secretary explicitly agreed that it

had "no basis for making such an allegation" (R. 8), and even conceded that the *bona fides* of the 75% meeting attendance candidacy qualification, with its avowedly laudable purpose, was in harmony with the aforementioned congressional policy. Of significance, is the following stipulation entered into, *inter alia*, by the parties, prior to trial:

> "One of the important purposes and objectives of the delegates to the conventions of the Glass Bottle Blowers Association of the United States and Canada, AFL-CIO, in promulgating the 75 per cent attendance requirement for eligibility for local union office was to encourage attendance at local union meetings by the members thereof, in order that such members may become aware of and familiar with the workings of their local unions, the kinds of problems and methods of procedure that confront their local unions in dealing with the problems of its membership, to obtain some knowledge as a predicate to their possible candidacy to union office, and otherwise to conduct themselves as trade union members to the end that they may make their union membership more meaningful." Stipulation I, Sec. 10 (R. 14-15).

After the trial, which was tried without a jury, the district court found as a matter of law that the local union's 75% meeting-attendance candidacy-requirement rule was not *per se* unreasonable (R. 44). However, the court was of the opinion that, when the 75% meeting attendance requirement rule was coupled with the local union's rule regarding excuses, the 75% rule, in effect, severely limited the eligible number of candidates for office and, *a fortiori*, became violative of the Act (R. 44). It is respectfully submitted that under the facts in this case, the district court's legal conclusion that the 75% *rule* violated the Act was erroneous. Nevertheless, the district court refused to set aside the 1963 election or to order the local union to

conduct its then impending election under the supervision of the Secretary because Petitioner had failed to establish that the 75% *rule* "may have effected [sic] the outcome" of the 1963 election (R. 46). The trial judge pointed out that the complaining member had "voluntarily absented himself from meetings on occasions not justified by sickness or other unavoidable emergency, and thus his failure to qualify was not due to the existence of the unreasonable requirements of the By-laws but to his own voluntary unwillingness to comply therewith" (R. 47). Accordingly, the Secretary's action was dismissed.[27]

In the 1963 election, John Miller was the only union member who was declared ineligible to be a candidate for local union office because he had not complied with the meeting attendance requirement rule when he failed to attend 7 of the 24 meetings held since the last election. Despite the fact that Mr. Miller had had many opportunities (even while testifying in court) to explain his absences, he could not account for 6 of the absences. The only absence he offered an explanation for was the November 1961 absence. However, his attendance at any one of the other 6 meetings would have satisfied the meeting attendance requirement rule and would have placed Mr. Miller in a position where he could have competed for the offices he sought. Significantly, as an officer of the Local Union, i.e., Treasurer, it was incumbent upon Mr. Miller to attend "and report monthly to the Local Union meeting the state and condition of all current financial matters." (R. 21). And despite the

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[27] Attention of the Court is directed to the fact that the Secretary and the Local Union had stipulated that if the district court ruled Local 153's 75% meeting attendance requirement rule invalid, then:

> "an order may be entered by [the court] directing nominations and elections for all offices of the defendant Local Union 153 . . . under the supervision of the Secretary of Labor . . ." (R. 22).

Although the district court recognized the laudable purpose of the **75% rule**, as had the Secretary in Stipulation I, Section 10 (R. 14-15), the court was of the opinion that only when the 75% rule and the rule limiting excuses were **coupled** together was there then a violation of the Act (R. 44). The "Stipulation" was therefore inapplicable.

fact that this responsibility was voluntarily assumed by the complainant, Mr. Miller failed to attend 7 of the 24 meetings held during the 2-year qualification period. As the NLRB recognized in the *Local 171, Pulp and Paper Workers* case, 165 NLRB 97, 65 LRRM 1382 (1967),

> "Poor attendance at business meetings, sometimes even a lack of a quorum to proceed, is common. It cannot be gainsaid that the *public's interest is served best* when the memberships of labor organizations that are the exclusive statutory representatives of employees take an active and responsible role in governing their unions and formulating union policy." (Emphasis added.)

It is this widespread apathy toward union meeting attendance, which exists among union members as a whole and is not limited to GBBA members alone, which accounts for the fact that merely a handful of members qualify for union office;[28] it is not the 75% meeting attendance requirement qualification that is responsible for the paucity of candidates. To argue that it is the 75% rule, and not the members' own volitional failure to attend meetings, which precludes a large percentage of union members from competing for union offices is myoptic. The past and present officers of Local 153 have done everything within their power to encourage union meeting attendance, to wit: (1) the meeting day is fixed; (2) the meeting time is fixed; (3) the meeting place is easily accessible to a majority of the members; and (4) door prizes are offered in the hope of encouraging attendance (R. 15). Despite these attempts to make the meetings more inviting, the evidence reveals that

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[28] See "Search for Reasons for Rank-and-File Rebellions," 64 **Labor Relations Reports** 133 (Feb. 13, 1967), wherein Malcolm L. Denise, Vice-President of Labor Relations for Ford Motor Co., observed that there is an absence of stability in labor relations, because as he states it:

> "For the average member, too many other things compete for his time and attention."

only a handful of members attend union meetings with any sort of regularity.[29] It is to this handful that the members, by virtue of their bylaws and constitutional provisions, have entrusted the extremely delicate task of directing the affairs of the local union. It is not the members of any "in group" who have dictated that prospective candidates for office must have attended 75% of the local union meetings, but instead, an informed electorate (delegates elected by the membership-at-large) which recognized that the general membership would fare better if control were placed in the hands of those who were somewhat familiar with the union's problems (R. 14).

The extremely important area of responsibility placed on union leadership in the day-to-day administration of the collective bargaining agreement and the maintenance of proper labor-management relations, so that the benefits of collective bargaining and continuity of employment can be maintained *without interruption* and *without pecuniary loss* to the members, both at their jobs and in the functions of the local unions, cannot be over-emphasized. The 75% meeting attendance requirement rule imposed on would-be candidates for union office comports with the objective set out above, i.e., that the membership of the local union should be assured that persons of competence, skill, ability and knowledge of the union's problems (and what better laboratory for gaining such experience than the union meeting) will be administering the needs of the general membership.

In addition, the trial record clearly established that Mr. Miller had testified falsely as to the number of meetings he was credited with having attended. Compare R. 24-26 with R. 26-34. Also, see the testimony of the Recording Secretary, R. 34-37. Nevertheless, it is the Secretary's contention that had the complainant, a man who had been untruthful about his attendance record on the witness stand and who

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[29] Report of William B. Kane, Area Director of U. S. Dept. of Labor. (Exhibit A), pp. 1b-3b.

had been derelict in his duties toward his fellow union members, been declared eligible as a candidate, his candidacy might have affected the outcome of the election.[30]

Since Section 402 (c) provides:

> "If, upon a preponderance of the evidence, after a trial, upon the evidence, the court finds . . . that the violation of section 401 may have affected the outcome of the election, the Court shall declare the election . . . to be void . . .",

the burden was upon the Secretary to prove by a preponderance of the evidence that there was a reasonable probability that the disqualification of Mr. Miller as a candidate for Local Union office might have affected the outcome of the Local Union's 1963 election. "The burden of proof and risk of persuasion has been placed upon the party who attacked [the] election." *Wirtz v. Local Union 125, Int'l Hod Carriers', etc.*, 231 F. Supp. 590, 595 (N. D. Ohio 1964). However, the record in this case is barren of any facts which would tend to establish that the alleged violation may have affected the outcome of the election. In addition, the trial court's opportunity to observe the parties and to get the "feel" of the case is entitled to great weight. Consequently, the reviewing tribunal "should not disturb the trial court's findings of facts" unless the Court is thoroughly satisfied that such findings are plainly unsupported by the record.

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[30] To champion the cause of a man who has exhibited little concern for his fiduciary obligations as an officer flies in the face of the announced congressional policy of the Act which provides:

> ". . . it is essential that labor organizations, employers and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations." Section 2 (29 U. S. C. §401 [a]).

CONCLUSION.

For the reasons set out in Argument I, the judgment of the Court of Appeals for the Third Circuit should be affirmed. But in the event this Court should determine that the Secretary's action has not been rendered moot by the union's intervening 1965 election, the judgment of the district court that the union's meeting attendance requirement rule did not affect the outcome of the election should be affirmed, since the district court's legal conclusion that the Union's meeting attendance requirement rule was unreasonable may be regarded as harmless error in this instance.

Respectfully submitted,

ALBERT K. PLONE,
Counsel for Respondent.

October 1, 1967.

APPENDIX.

EXHIBIT A.

William B. Kane, Acting Area Director — March 8, 1966

William J. McGladigan, Compliance Officer

LU 66, GBBA
Washington, Pa.
File: 36-874

On February 25 and 28, and March 4, the following election records of the subject were analyzed and examined.

Attendance Register:

The local's recording secretary maintains an 8½ x 11 permanently bound book which is used as an attendance register. Each member who attends a regular monthly meeting signs the register as evidence of attending the meetings. If a member is unable to attend and is excused his written excuse is attached to the page of the register for that meeting. He is counted present.

The attendance register and written excuses were examined for the period Oct. 1963 to Sept. 1965. During this period the local held 23 regular meetings. There was no meeting held May 1965. Therefore to be eligible for office a member must have attended at least 17 meetings.

As a result of this examination, the following information was obtained:

Percentage of 23 Meetings	No. of Members Attended
75%	9
50%	20
25%	26
less than 25%	152

Number of Meetings	No. of Members Attended
17	9
16	9
15	11
14	13
13	15
12	16
11	19
10	20
9	21
8	22
7	24
6	26
5	30
4	38
3	57
2	82
1	149

Of the total membership of 407, 9 members attended 75% of the 23 regular meetings thereby eligible to be candidates for the 9 offices to be filled. This represents 2.2% of the total membership who were eligible and 97.8% who were not eligible.

The complainant, Edward H. Razvoza, was credited with attending 11 meetings of the total 23 held. Of these 11 meetings 2 were excused absences for working.

William Thompson and Joseph Burke, appointed to fill the 2 offices of trustee for which there were no nominees, attended 11 and 8 meetings, respectively, of the 23 held.

Membership List

The employee list, compiled by Brockway Glass Co. which shows the names and mailing addresses of LU 66 members was used by the election committee to mail notices of nominations and elections to the membership. This list contains 407 names. Grace Longstreath, chairman of the election committee, obtained mailing address labels from the company to mail out the notices. She checked the labels against the list to make sure they corresponded.

The local's regular meetings are held the first Tuesday of the month at 7:00 P.M. in the Labor Temple, Washington, Pa.

Members of the local are employed by the Brockway Glass Company, plant No. 11, Washington, Pa. Both male and female members work 3 eight hour shifts; 8 A.M. to 4 P.M., 4 P.M. to 12 midnight and 12 midnight to 8 A.M.